Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

GERALD HUFFMAN, *et al.*,

Petitioners,

v.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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JURISDICTION

Respondent County of Los Angeles does not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent County of Los Angeles ("County") respectfully submits that the published opinion of the United States Court of Appeals for the Ninth Circuit contains an accurate description of the substantive and procedural facts in this action. (Pet. App. 1-5.)

However, because petitioners have discussed these facts at length, but not always correctly, the County will provide a brief overview of the case. The overview will also show that the Court of Appeals held proximate cause lacking. This holding was not only correct, but it renders irrelevant petitioners' "Question Presented," which pertains only to the scope of Fourteenth Amendment "substantive" due process.

A. Procedural Facts

This case arose when Thomas Kirsch, an off-duty Los Angeles County deputy sheriff, shot and killed John Huffman during a barroom brawl. (Pet. App. 2.) Huffman's parents, Gerald Huffman and Gunilla Lukse ("the Huffmans") brought a 42 U.S.C. § 1983 action against the County of Los Angeles and Sheriff Sherman Block ("the County"). (Pet. App. 4.) The Huffmans also sued Thomas

Kirsch, but settled with him for $300,000 before trial. (Pet. App. 5 n.2.)

The Huffmans asserted that the County had violated their rights under the substantive due process clause of the Fourteenth Amendment by "devot[ing] insufficient attention to the unlawful use of firearms by off-duty deputies." (Pet. App. 5.) After the close of the Huffmans' case, and again after the close of the County's case, the County moved for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. However, the motions were denied despite the fact that the trial court determined as a matter of law that Kirsch was not acting under color of law. (Pet. App. 5-7.)

The jury returned a special verdict awarding the Huffmans $750,000 in damages. The County renewed its Rule 50 motion, which was once again denied. The district court entered judgment for the Huffmans in the amount of $450,000 after subtracting the $300,000 settlement paid by Kirsch. The County filed a motion for new trial and again renewed its Rule 50 motion, but both motions were denied. (*Id.*)

The County appealed, and the judgment was reversed and remanded with directions to dismiss "[b]ecause Kirsch's private acts were not foreseeable by the County, and did not occur under color of law." (*Id.* at 15.) *The Court of Appeal specifically refused to decide whether an injury caused by a state-created danger to the general public can give rise to liability under the Fourteenth Amendment.* (*Id.* at 14-15 n.4.) Following the denial of their petition for rehearing and suggestion for rehearing en banc, the Huffmans petitioned for certiorari.

B. Substantive Facts

Around 7:00 on the evening of August 14, 1994, off-duty Los Angeles County sheriff's deputy Thomas Kirsch went to Whitney's Steakhouse, a bar-restaurant. Kirsch had brought his official identification, and was also carrying his personal, off-duty revolver in the waistband of his pants. The gun was loaded with departmentally-issued ammunition. Kirsch, who had been drinking earlier in the day, continued to do so. (Pet. App. 1.)

Around 8:00, John Huffman and his girlfriend, Deena Hughes, arrived at Whitney's. In a little over an hour, they drank two or three beers each and shared a "kamikaze," a mixed hard liquor drink. Huffman and Hughes, who did not know Kirsch, began to engage him in conversation. Kirsch did not tell them he was a sheriff's deputy, but stated he owned an air conditioning company. (Pet. App. 2-3.)

Huffman and Kirsch's interactions became increasingly more combative, and Huffman eventually offered Kirsch $40.00 to " 'go out and settle this.' " (Pet. App. 3.) At some point, Kirsch said " 'I'm going to go for it,' or some similar remark." (*Id.*)

Huffman eventually left the bar and Kirsch followed by a different route. After Kirsch walked out the door, he was taken to the ground by Huffman, a high school and college wrestler. Kirsch never gave Huffman any commands, nor did Kirsch identify himself as a peace officer. Kirsch and Huffman struggled, Kirsch's weapon came out, he got hold of it and fatally shot Huffman. (Pet. App. 3-4.)

Kirsch was subsequently found to have a blood-alcohol level of around .25% at the time of the shooting. Huffman's blood-alcohol level was .18% at the time of his death. Huffman's autopsy revealed that he had used between " 'a third of a line and a line' " of cocaine within four hours of the shooting. (Pet. App. 4.)[1]

REASONS FOR DENYING THE WRIT

This writ should be denied because deciding petitioners' question presented would not affect the outcome of this case and because petitioners are wrong on the merits.

I.

THE OUTCOME OF THIS CASE WOULD NOT BE AFFECTED EVEN IF THIS COURT RULED IN PETITIONERS' FAVOR ON THE QUESTION PRESENTED.

A. The Court Of Appeals Held Causation Lacking, So There Is No Need To Decide Whether A Public Entity Can Be Subjected To Constitutional Liability For Injuries Inflicted By A Private Actor On A Member Of The General Public.

Petitioners have presented the following question:

> Whether municipal liability under 42 U.S.C. § 1983 may be predicated upon harm inflicted

[1] Petitioners have included in their "Statement of the Case" inaccurate assertions regarding purported Los Angeles County Sheriff's Department policies, customs and practices. (Pet. 3.) These "facts" will be discussed in the argument section demonstrating the Court of Appeals correctly held causation lacking as a matter of law.

> by a person who was not acting under color of law but who was acting pursuant to a policy and widespread custom and practice of a public entity which created a danger to the public; or, more specifically, where a county and its sheriff require or encourage their off-duty deputy sheriffs to carry firearms at all times, including when they are consuming alcohol, and there is a widespread custom and practice of doing so, may the county and its sheriff be held liable for an unreasonable shooting of a person by an intoxicated off-duty deputy sheriff even though the policy, custom and practice were not directed at specific individuals?

(Pet. i.)

Assuming arguendo this Court answered "yes," the outcome of this case would not change. Such a ruling would permit a plaintiff to sue a public entity under § 1983 for injuries to a member of the general public inflicted by a person who was not acting under color of law but was still supposedly acting pursuant to the custom, policy or practice of the public entity. However, the plaintiff would still have to show causation, which petitioners failed to do.

Causation is an element of actions brought pursuant to 42 U.S.C. § 1983. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) (there must be a "direct causal link between" a City policy, custom or practice and plaintiffs' injuries). The Court of Appeals based its holding on the absence of proximate cause, stating "we hold . . . that the 'facts do not show, as a matter of law' that the County could have foreseen Kirsch's 'private acts' when it

allegedly required him to carry a gun off duty." (Pet. App. 12.)

Because the Court of Appeals held proximate cause was lacking, it would be pointless for this Court to answer the question petitioners presented. *Cf. Martinez v. California*, 444 U.S. 277, 284 (1980) (lack of causation made it unnecessary to decide whether state parole officers could potentially deprive plaintiff's decedent of a constitutional right by releasing a prisoner on parole). Therefore, the petition for certiorari should be denied.

B. This Court Should Not Be Misled By Petitioners' Attempt To Conflate Causation With The Potential Scope Of Fourteenth Amendment Liability.

Petitioners argue the writ should be granted in order to resolve a conflict between United States Circuit Courts of Appeals regarding whether a public entity that creates a danger to the general public, but not to an identifiable individual, can be held liable under the Fourteenth Amendment for a substantive due process violation. (Pet. 15-17.) The Court of Appeals recognized this conflict, but expressly refused to become involved in it, stating "[b]ecause [petitioners'] claim would fail regardless of whether the danger-creation theory extended to threats to the general public, we leave resolution of this question for another day." (Pet. App. 14-15 n.4.)

Petitioners concede the Court of Appeals "denied that it was deciding that question." (Pet. 5.) Petitioners nonetheless assert that "the text of the opinion reveals that it did in fact decide that the specific incident must be predictable." (*Id.*) Petitioners appear to believe that such

a holding would effectively preclude public entity liability for injuries inflicted by private actors on members of the general public.

Petitioners' reasoning rests upon a faulty premise because the Court of Appeals did not hold that "specific incident[s] must be predictable." (*Id.*) It held only that the bizarre events *in this case* were not foreseeable. (Pet. App. 12.) These events were as follows:

> (1) Before the incident, Kirsch consumed four or five hard-liquor drinks, elevating his blood-alcohol level to approximately .25%; (2) Kirsch exchanged unpleasant words with Huffman in the bar, after which Huffman exited the bar with the intention of going home; (3) Kirsch followed Huffman out of the bar by a separate route, even though Kirsch knew that he had a gun tucked in his belt and that Huffman was unarmed; and (4) Kirsch shot Huffman in the chest as the men wrestled outside the bar.

(Pet. App. 12.)

In holding these particular events unforeseeable as a matter of law, the Court of Appeals expressly followed its prior decision in *Van Ort v. Estate of Stanewich*, 92 F.3d 831 (9th Cir. 1996). (Pet. App. 12.) In that case, it rejected a similar substantive due process claim brought by plaintiffs robbed by an off-duty peace officer who had previously been to their home. *Van Ort*, 92 F.3d at 833-34, 837. Because that officer's equally bizarre acts were " 'unforeseeable,' they broke the chain of proximate cause. . . . " (Pet. App. 11.)

As in *Van Ort*, the Court of Appeals based its holding in the present action on events peculiar to the case. For

this reason, there is no merit to petitioners' assertion that the decision precludes public entities from ever being held liable under substantive due process for injuries to members of the general public.

This court should reject petitioners' misguided attempt to drag this case into an inter-circuit conflict the Court of Appeals explicitly avoided by deciding Kirsch's actions were not foreseeable. The petition for certiorari should be denied.

II.

PETITIONERS ARE WRONG ON THE MERITS BECAUSE THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE INCIDENT WAS UNFORESEEABLE AS A MATTER OF LAW, SO CAUSATION WAS LACKING.

Petitioners contend that the "incident" involving Kirsch and Huffman was "manifestly foreseeable." (Pet. 5.) Petitioners, whose argument here (as in the Court of Appeals) is constructed largely by distorting the record, are wrong.

The linchpin of petitioners' argument is that the County purportedly "had notice of repeated instances of misuse of firearms by intoxicated, off-duty deputy sheriffs." (Pet. 6.) Specifically, petitioners contended that "the department knew of eighty incidents from 1989 to 1994 in which off-duty deputies discharged or brandished firearms" and "[o]f these incidents, fifteen involved the use of alcohol." (Pet. App. 11-12.) However, since these incidents occurred during a six year period on a 7500 officer force, there was only "one alcohol-related shooting or

brandishing per 3000 deputies per year." (Pet. App. 12 n.3.)

Only in petitioners' attorney's fevered imagination could such infrequent misuse of firearms in connection with alcohol amount to "notice of repeated instances of misuse of firearms by intoxicated, off-duty sheriffs." Most significantly, these occasional incidents did not in the least render it foreseeable that an off-duty deputy will go into a bar, get extremely drunk, respond to a challenge to fight, and then shoot his opponent! This is especially true when the deputy is a 24 year veteran who is on the bomb squad. (Excerpts of Record ["ER"] 146.1:9-16, 147:7-148:3, 196:3-5.)

Much of petitioners' other "evidence" supposedly bearing on foreseeability was also flawed or nonexistent. For example, petitioners contend that the Sheriff's Department "made a policy decision to refrain from restricting the carrying of firearms by its off-duty deputy sheriffs." (Pet. 6.) This contention is wrong because California law precludes the Sheriff's Department from placing *any* restrictions on active deputies (such as Kirsch) regarding the carrying of firearms off-duty. *Orange County Employees Assn., Inc. v. County of Orange,* 17 Cal.Rptr.2d 695, 698-99 (1993). For this reason, the Department cannot be held responsible for what petitioners term "a longstanding and widespread custom . . . that deputy sheriffs carried firearms while off duty and while consuming alcohol." (*See* Pet. 6.)

Petitioners also assert that the Sheriff's Department "had a policy which required and encouraged deputy sheriffs to carry firearms at all times." (Pet. 6.) In reality,

the Sheriff's Department *at one time* had such a policy, but the policy was eliminated in 1991 or 1992. (*Id.*) No evidence in the record even suggests this policy was ever reinstated.[2]

Plaintiffs allege the Sheriff's Department "had a practice of failing to train, investigate, or impose appropriate discipline concerning the use of firearms by off-duty deputy sheriffs." (Pet. 6.) However, the undisputed evidence showed that, since 1992, the Department has conducted investigations of force use, including off-duty shootings, which "evaluate the conduct of the officer both from a policy standpoint, a tactical standpoint and a training standpoint." (ER 187:10-15, 188:5-8, 189:4-7.) If the Department finds an officer uses unreasonable force, the Department then considers appropriate discipline. (ER 184:9-13.)

Petitioners themselves concede that the Sheriff's Department requires that off-duty "deputies not be so intoxicated that they are unable to care for themselves or others." (Pet. 7.) The Court of Appeals cited this regulation as bolstering its conclusion that the Sheriff's Department could not have reasonably anticipated Kirsch's actions on the night he shot Huffman. (Pet. App. 13.)

The undisputed evidence further demonstrated that the Sheriff's Department trains its deputies not to carry

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[2] Portions of Kirsch's Answer to the complaint that were admitted into evidence stated that he was permitted, encouraged or required to carry a firearm at all times. However, this material was admitted only to impeach Kirsch and was not to be considered as substantive evidence. (ER 15:9-17, 203:2-204:10.)

guns when drinking, not to become intoxicated in public, not to take police action while off duty unless this is necessary and not to use excessive force. (ER 180:6-16, 181:6-10, 182:24-183:4, 190:2-13, 190:23-191:1, 192:19-25.) The Department also provides training and counseling on the dangers of alcohol abuse, and monitors "alcohol abuse or alcohol problems that deputies may have." (ER 192.1:18-20, 192.2:8-19.)

Ultimately, petitioners' argument reduces to the proposition that because " 'guns and alcohol don't mix' . . . it cannot be claimed that the danger of combining them is unforeseeable." (Pet. 15.) The above-described evidence clearly shows that the Los Angeles County Sheriff's Department recognizes guns and alcohol don't mix. However, no one can reasonably argue that knowledge of this general proposition enabled the Sheriff's Department to foresee Kirsch's criminally witless actions. Therefore, the Court of Appeals' decision was correct on the merits. For this reason too, the petition for certiorari should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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